

The following exhibits were admitted into evidence: DOT Exhibits 1 – 9 and Kelley’s personnel file maintained at the State Personnel Department.

Stephen L. Blair, District 45 Administrator, East Central Region, testified on behalf of ALDOT. After being properly served with the date, time and hearing location, Kelley failed to appear and testify on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

On November 9, 2022, a pre-dismissal conference was held. Based upon Kelley’s responses to the charges against him and the evidence introduced during the conference, DOT dismissed Kelley from service effective November 22, 2022. DOT Exhibit 3 (dismissal letter, dated November 22, 2022, and signed by John R. Cooper (“Cooper”), Transportation Director) states in part:

A pre-dismissal conference was scheduled for you on Monday, November 21, 2022. Present at the conference were Mr. DeJarvis Leonard and you. During this time, you were provided an opportunity to present any relevant information regarding your proposed dismissal. I have reviewed the charges against you and the results of your pre-dismissal conference with DeJarvis Leonard. For the reasons stated below, you are hereby notified of your dismissal from the Alabama Department of Transportation effective at the close of business Tuesday, November 22, 2022.

Most recently, you have incurred 4.45 hours of LWOP for the pay period ending on 5/15/2022. This is the fourth occurrence during this calendar year that you have incurred LWOP during separate pay periods. You have displayed a pattern of absenteeism by going on

leave without pay on multiple occasions throughout your employment with the Alabama Department of Transportation.

Your actions constitute violations of the following rules and policies:

- Violation of General Work Rule 670-X-19-.01; (1)(a)1 – Absenteeism – [Unexcused absences, unreported absences, a pattern of absences, or excessive absences.]
- Violation of General Work Rule 670-X-19-.01; (1)(b)13 – Conduct unbecoming a state employee.
- Violation of ALDOT’s Attendance, Punctuality and Training Policy.
- Violation of District 5 Leave Policy.

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Kelley timely appealed his dismissal to the State Personnel Board and requested a hearing, pursuant to *Ala. Code 1975*, § 36-26-27(a). In addition to the dismissal letter, the Administrative Appeal Record also contains DOT’s Plain Statement of Facts, in which DOT essentially reiterates the same charges/allegations contained in the dismissal letter.

II. FINDINGS OF FACT

Having reviewed the documentary evidence and having heard the testimony presented at the hearing and having observed the witnesses’ demeanor and assessed

their credibility, the undersigned finds sufficient evidence supports the following findings of facts.¹

A. Employee's Personnel File and Career History²

Kelley began his State employment with the Alabama Department of Transportation in June 2005 as a "Highway Maintenance Technician I." On March 1, 2007, Kelley's title was changed to "Transportation Worker." Kelley remained in that classification until his dismissal, effective close of business November 22, 2022.

Kelley's annual performance appraisals ("APA") while at DOT reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
11/22	15.5	Partially Meets Standards
11/21	28.3	Exceeds Standards
11/20	28.3	Exceeds Standards
11/19	23.0	Meets Standards
11/18	26.7	Exceeds Standards
11/17	27.7	Exceeds Standards
11/16	27.8	Exceeds Standards
11/15	27.8	Exceeds Standards
11/14	27.8	Exceeds Standards
11/13	9.7	Partially Meets Standards
11/12	19.7	Meets Standards
11/11	27.8	Exceeds Standards

¹All references to exhibits and testimony are intended to assist the State Personnel Board in considering this recommended order and are not necessarily the exclusive sources for such factual findings.

²See generally State Personnel Board Rules 670-X-18-.02(5) and 670-X-19-.01(1)(b) (employee's work record, including performance and disciplinary history, and length of service considered in dismissing employee).

11/10	27.8	Exceeds Standards
11/09	26.7	Exceeds Standards
11/08	8.56	Partially Meets Standards
11/07	18.6	Meets Standards
11/06	24.4	Meets Standards
12/05	27.5	Exceeds Standards ³

Kelley's disciplinary history at DOT includes, in reverse chronological order:

- Reprimand on May 23, 2022, for Absenteeism/LWOP.
- Warning on April 20, 2022, for Absenteeism/LWOP.
- Counseling on February 3, 2022, for Absenteeism/LWOP.
- Warning on November 3, 2021, for Absenteeism – Violation of District 5 Leave Policy.
- Warning on April 20, 2021, for Absenteeism/LWOP.
- Counseling on April 7, 2021, for Absenteeism/LWOP.
- Warning on November 16, 2020, for Absenteeism/LWOP.
- Warning on September 9, 2020, for leaving job station without permission and falsification of documents.
- Counseling on January 21, 2020, for Absenteeism/LWOP.
- Reprimand on March 29, 2019, for Absenteeism/LWOP.
- Warning on March 5, 2019, for Absenteeism/LWOP.
- Counseling on February 22, 2019, for Absenteeism/LWOP.
- Reprimand on November 13, 2018, for Absenteeism/LWOP.

³ Final Probationary Evaluation for Highway Maintenance Technician I.

- Warning on September 6, 2018, for Absenteeism/LWOP.
- Counseling on February 8, 2018, for Absenteeism/LWOP.
- Counseling on October 19, 2017, for falsification of records, leaving job station without permission, and abuse of equipment.
- Warning on October 18, 2017, Absenteeism/LWOP.
- Counseling on May 30, 2017, Absenteeism/LWOP.
- Counseling on April 25, 2017, Absenteeism/LWOP.
- Warning on September 8, 2016, Absenteeism/LWOP.
- Counseling on August 25, 2016, Absenteeism/LWOP.
- Counseling on June 9, 2015, Absenteeism/LWOP.
- Warning on January 8, 2015, Absenteeism/LWOP.
- Counseling on August 21, 2014, Absenteeism/LWOP.
- Warning on April 9, 2013, Absenteeism/LWOP.
- Counseling on January 18, 2013, Absenteeism/LWOP.
- 3-day Suspension on December 12, 2012, Absenteeism/LWOP.
- Reprimand on May 9, 2012, Absenteeism/LWOP for pay period ending April 30, 2012.
- Warning on May 9, 2012, Absenteeism/LWOP for pay period ending April 15, 2012.

- Counseling on April 10, 2012, Absenteeism/LWOP.
- Counseling on January 21, 2011, Absenteeism/LWOP.
- Counseling on October 29, 2010, for frequent tardiness.
- Counseling on March 25, 2010, for reporting directly to work station, instead of signing in.
- Counseling on August 20, 2009, Absenteeism/LWOP.
- Reprimand on August 26, 2008, for not obtaining CDL license, as required for the job.
- Suspension on June 23, 2008, leaving without permission and insubordination.
- Reprimand on June 20, 2008, for not obtaining CDL license, as required for the job.
- Warning on June 4, 2008, for not obtaining CDL license, as required for job.
- Counseling on April 22, 2008, for not obtaining CDL license, as required for job.
- Reprimand on July 25, 2007, for refusing to sign a reprimand served on July 20, 2007.
- Reprimand on July 20, 2007, for not obtaining CDL license, as required for job.
- Reprimand on April 30, 2007, for not obtaining CDL license, as required for job.

- Warning on April 20, 2007, for not obtaining CDL license, as required for job.
- Counseling on December 18, 2006, for not obtaining CDL license, as required for job.
- Counseling on October 17, 2006, for not obtaining CDL license, as required for job.

B. State Personnel Board General Work Rules and DOT Work Rules Forming the Basis of the Charges

Rule 670-X-19-.01 provides, in part:

(1) In addition to any special rules issued by the various appointing authorities for the guidance of their employees, the following standard general work rules shall apply to all classified employees:

(a) Violations that normally result in disciplinary actions of increasing severity:

1. Absenteeism – unexcused absence, unreported absence, a pattern of absences, or excessive absences.

...

(b) More serious violations that may result in suspension or discharge on the first offense, considering work record and length of service.

...

13. Conduct unbecoming a state employee.

...

The District 5 Leave Policy II. Types of Leave, C. Tardiness and Unapproved Absences, states in pertinent part:

...

2. Unexcused Absences (Absenteeism): Employee's absence from their place of employment for more than two hours after the start of their work hours without calling in properly, whose absence was not prior approved as defined in the above sections, and/or whose absence is unexcused by their supervisor. The following schedule shall apply to unexcused absences within a twelve-month period:

1st Occurrence – Counseling Session

2nd Occurrence – Warning

3rd Occurrence – Written Reprimand

4th Occurrence – Five (5) day suspension

5th Occurrence – Ten (10) day suspension

6th Occurrence – Dismissal

Note the punishment can be increased if the employee has other disciplinary actions during the same time period for other violations. After a twelve-month period, the unexcused absence is no longer counted and the cycle will begin again.

LEAVE WITHOUT PAY (LWOP) is considered absenteeism and will fall under this section. Each occurrence of LWOP will be considered a separate incident.

C. Facts Leading to Dismissal

On May 10, 2022, Kelley took 8 hours of leave: 30 minutes of sick leave, 2 hours and 45 minutes of annual leave, and 4 hours and 45 minutes of Leave Without Pay (“LWOP”).⁵ On June 15, 2022, Stephen L. Blair (“Blair”), District 45 Administrator, submitted a recommendation to Area Operations Engineer Shannon Jones (“Jones”), asking for Kelley to be suspended for 5 days, without pay, based upon the District 5 Leave policy.⁶ Blair explained that the 5 day suspension is the proper punishment based upon the District 5 Leave Policy. On July 11, 2022, Jones forwarded Blair’s recommendation to Region Engineer DeJarvis Leonard (“Leonard”), requesting a 10-day suspension without pay for Kelley based upon his most recent LWOP incident.⁷ Blair recommended aggravating the discipline based upon Kelley’s overall work record. Blair pointed out that Kelley “has been previously disciplined over 40 times in the last 16 years.”⁸ Blair also pointed out that Kelley was reprimanded 7 times and suspended twice. Blair recommended

⁴ Kelley signed the District 5 Leave Policy on November 2, 2011; *See* DOT Exhibit 7.

⁵ DOT Exhibit 1, page 182.

⁶ DOT Exhibit 1, page 181.

⁷ DOT Exhibit 1, page 179-181.

⁸ *Id.* at page 179.

Kelley be referred to the Employee Assistance Program (“EAP”). On July 14, 2022, Leonard submitted a recommendation supporting Kelley’s 10-day suspension to Cooper.⁹ Leonard pointed out Kelley’s continual violation of District 5’s Leave Policy and included Kelley’s prior disciplinary actions. On Tuesday, November 8, 2022, a suspension hearing was held regarding the proposed 10-day suspension. The hearing was conducted by Robert McWhorter (“McWhorter”), a Retired State Employee. McWhorter found that the evidence showed Kelley received 14 warnings, 9 reprimands and 2 suspensions as an employee of DOT. McWhorter concluded that the amount of prior discipline, “is evidence of someone who has difficulty with departmental policy and procedure compliance.”¹⁰ McWhorter concluded, “If dismissal was an option that would be my recommendation. However, it is not.”¹¹ He concluded the 10-day suspension was warranted. On November 15, 2022, Phillip McIntosh (“McIntosh”), Bureau Chief of DOT’s Personnel Bureau wrote a note to file regarding conversations he had with Cooper about Kelley.¹² Specifically, it was noted that Cooper wanted to know if Kelley

⁹ DOT Exhibit 1, page 177-179.

¹⁰ DOT Exhibit 6, page 306.

¹¹ Id. McWhorter was only reviewing discipline for the current absenteeism infraction and was not considering the additional charge of conduct unbecoming a State employee.

¹² DOT Exhibit 9.

was previously offered EAP. McIntosh wrote, “From what Mr. Cooper discussed, if Mr. Kelley had a problem and was seeking EAP assistance, [Cooper] would be inclined to move forward with the suspension. However, if Mr. Kelley had not, [Cooper] was not inclined to suspend but rather to terminate, as Mr. Kelley had multiple incidents of absenteeism over the years and no disciplinary actions have corrected his absenteeism.”¹³

Blair testified at the hearing. Blair confirmed that Kelley was offered EAP assistance on at least three prior occasions, and he denied each offer. Two were specifically included in the record, one dated October 27, 2022, and another dated July 25, 2008.¹⁴ Kelley was also referred to EAP on or around December 6, 2012.¹⁵ Blair explained that District 5 created a separate leave policy because they were having problems retaining employees and wanted to offer them more opportunities to correct their behavior. Blair testified that Kelley’s prior discipline was unique; Blair did not have another employee in his district get past the warning phase. Blair also explained the difficulty of having employees not showing up for work and the burden that places on supervisors to revise assignments.

¹³ Id.

¹⁴ DOT Exhibit 8.

¹⁵ DOT Exhibit 1, page 75.

In his dismissal appeal letter, Kelley expressed surprise that he was dismissed based on the District's leave policy and that his LWOP occurred several months before he was dismissed. Kelley's LWOP incident occurred during the pay period ending on May 15, 2022. On July 11, 2022, Kelley applied for and received Family and Medical Leave Act Leave due to an "ongoing illness."¹⁶ Kelley indicated he returned to work on October 17, 2022. Kelley alleged that his physician's office called him on October 13, 2022 and informed him that someone from DOT called their office to inquire about his medical condition. Kelley alleged this was a violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"). Kelley alleged he filed a grievance on October 18, 2022, with DOT and included a copy with his appeal.¹⁷ Kelley believed his dismissal was retaliation for his filing a grievance and taking FMLA leave.

Kelley did not appear at the hearing, he did not testify on his own behalf, and he did not present testimony from other witnesses to corroborate his claims. On December 9, 2022, Kelley failed to answer his telephone for the prehearing conference. Shortly after the pre-hearing, Kelley called the undersigned's office and claimed he had an attorney but did not disclose the name of the attorney when

¹⁶ ALJ File, Kelley's letter of appeal, page 1.

¹⁷ Id.

asked. The Scheduling Order was mailed to both parties on that same date. The hearing was scheduled for January 20, 2023. At 4:26 p.m. on January 19, 2023, Kelley called the undersigned's office and asked for a continuance. He requested the continuance because his attorney was unavailable for the January 20, 2023, hearing date. His request for a continuance was granted. On January 20, 2023, the undersigned ordered Kelley to identify the name and contact information of his attorney and scheduled a status conference for January 25, 2023. On January 23, 2023, Kelley provided the name of his attorney, but a formal Notice of Appearance was not filed. On January 25, 2023, a status conference was held, Kelley indicated he had not officially retained counsel because he needed more money. The hearing was continued until March 3, 2023, to give Kelley additional time to secure finances for representation. On March 2, 2023, at approximately 2:39 p.m., Kelley called the undersigned's office and indicated he wanted to withdraw his appeal. Kelley was asked to provide a written request by 4:30 p.m. Kelley did not submit a written request by the deadline, so he was instructed by email to appear at the hearing the next morning.

III. ISSUE

Did DOT produce sufficient evidence to warrant dismissal of Kelley?

IV. DISCUSSION

Standard of Review

The purpose of the administrative appeal is to determine if the termination of the employee's employment is warranted and supported by the evidence. *Kucera v. Ballard*, 485 So. 2d 345 (Ala. Civ. App. 1986); *Thompson v. Alabama Dept. of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985); *Roberson v. Personnel Bd. of the State of Alabama*, 390 So. 2d 658 (Ala. Civ. App. 1980). In *Earl v. State Personnel Board*, 948 So. 2d 549 (Ala. Civ. App. 2006), the Alabama Court of Civil Appeals reiterated:

[D]ismissal by an appointing authority ... is reviewable by the personnel board only to determine if the reasons stated for the dismissal are sustained by the evidence presented at the hearing.

Id. at 559, quoting *Johnston v. State Personnel Bd.*, 447 So. 2d 752, 755 (Ala. Civ. App. 1983).¹⁸

In determining whether an employee's dismissal is warranted, the departmental agency bears the burden of proving the charges warrant dismissal by a "preponderance of the evidence." The law is well settled that a "preponderance of

¹⁸The Alabama Court of Civil Appeals went further to hold: "both this court and the circuit court must take the administrative agency's order 'as prima facie just and reasonable' and neither this court nor the circuit court may 'substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.'" *Id.* at 559, citing Ala. Code 1975, § 41-22-20 (k); *State Dept. of Human Res. v. Gilbert*, 681 So. 2d 560, 562 (Ala. Civ. App. 1995).

the evidence” standard requires a showing of a *probability* that the employee is guilty of the acts as charged. Thus, there must be more than a mere possibility or one possibility among others that the facts support the disciplinary action at issue. The evidence must establish that *more probably than not*, the employee performed, or failed to properly perform, as charged. See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997), holding that a “significant possibility” falls far short of the APA’s preponderance of the evidence standard. See also *Wright v. State of Tex.*, 533 F. 2d 185 (5th Cir. 1976).¹⁹

An administrative agency must act within its constitutional or statutory powers, supporting its decision with substantial evidence. “Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and it must be ‘more than a scintilla and must do more than create a suspicion of the existence of a fact to be established.’” *Alabama Alcoholic Beverage Control Bd. v. Tyson*, 500 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

The Code of Alabama, 1975, states in pertinent part: “An appointing authority may dismiss a classified employee whenever he considers the good of the

¹⁹In *Bonner v. City of Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

service will be served thereby, for reasons which shall be stated in writing, served on the affected employee and a copy furnished to the director . . .” (§ 36-26-27(a) *see also* State Personnel Board Rule 670-X-18-.02). Case law in Alabama defines “for the good of the service” as:

Removal for the good of the service means that the employee must be discharged for a cause. The cause for which the employee is discharged must “interfere with the effective discharge of the employee’s duties and/or the effective discharge of the duties of the department for which he works, so as to make his continued employment harmful to the public interest.” Citing *Maddox v. Clark*, 422 So. 2d 791 (Ala. Civ. App. 1982). *Fulton v. Department of Public Health*, 494 So. 2d 73 (Ala. Civ. App. 1986)

The Facts Warrant Dismissal

In the present case, DOT provided sufficient evidence to support Kelley’s dismissal. The evidence showed that Kelley repeatedly violated State Personnel Board General Work Rule 670-X-19-.01 (1)(a)(1) Absenteeism – failing to report to work for his assigned shifts and exhausting his leave balances which placed him in LWOP status on multiple occasions. Kelley’s complete disregard for DOT’s attendance policy and his abuse of the more generous District leave policy was a clear violation of Board rule 670-X-19-.01(1)(b)(13) Conduct unbecoming a state employee. Kelley refused to change his negative work habits even though he was

counseled, coached and progressively disciplined in an effort to help him. He accepted repeat discipline as though it was an entitlement. Ultimately, while Kelley's supervisor continued to follow the structure of the lenient District policy, Cooper aggravated the discipline based upon Kelley's failure to correct his behavior after repeated discipline. Cooper showed concern for Kelley by inquiring about the steps taken to help Kelley through EAP. In the end, though DOT tried to help Kelley in a multitude of ways, Kelley failed to help himself. Kelley never took ownership of his wrongdoing.

Progressive discipline is designed to assist employees by revealing problem areas and allowing them an opportunity to correct the negative behavior. In this case, Kelley was given considerable opportunities to change his negative work habits. Every attempt was made by DOT supervisors to help Kelley. DOT's decision to dismiss Kelley was "for the good of the service" and supported by substantial evidence.

The undersigned has carefully considered mitigation in this case. The undersigned finds no grounds for mitigation exist justifying a lesser disciplinary action than dismissal. Kelley provided no evidence to support the blanket allegations in his appeal letter. Further, there was no evidence that the ultimate decision maker on Kelley's dismissal, Cooper, was aware of Kelley's grievance.

The undersigned finds the totality of the evidence warrants dismissal in this cause; therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHELD.²⁰

Done, this the 14th day of April 2023.

A handwritten signature in black ink, appearing to read "Randy C. Sallé", is written over a horizontal line.

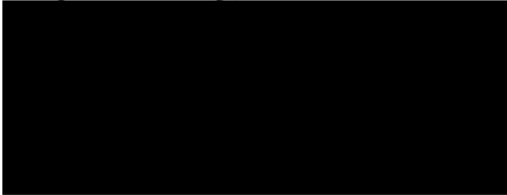
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²⁰Having found sufficient evidence to uphold the dismissal, any/all remaining issues are moot.

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